Is corporate social responsibility anything more than a mask for multinational (oil) companies?

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Introduction

In this chapter we address a certain problematic use of corporate social responsibility (CSR). After first stopping at various CSR definitions, we ask ourselves what kind of responsibility CSR really is? We continue by pointing out its contested rationale and ask ourselves whether CSR is legitimate and ought to be desirable? Within this debate, we discuss the proposition that CSR can be tolerated only in the case when it is employed as a veil for increasing the corporation's profits. One such use is the case when a corporation employs CSR as a tool for creating a fake façade or a mask over its unethical, illegal or criminal conduct. Bearing such cases in mind, some scholars (*cf.* Bakan, 2004; Babiak and Hare, 2007) have suggested the analogy between a (deviant) corporation and a human psychopath. We present this analogy in some detail and show various examples of using CSR as a mask by some multinational oil corporations. In conclusion, we answer the question posed in the title.

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Organisational choices in relation to the law

Looked at from the binary and sometimes simplified, legalistic ("either legal or illegal") perspective, the main choices of a corporation as a subject of the law are rather simple: 1) it can either comply or 2) not comply with the law.[2] Needless to add, these two options or perhaps better – short or long terms attitudes – are in most cases not fixed once and for all; they may be shifting in time and may be partially or selectively applied. We also know that some smart corporations try to influence the substance of the law in their favour beforehand, thus avoiding being tempted by the risky second option. But for our purpose here we are principally interested in a third choice they may also make; they may voluntarily go beyond the duties of the law. This is, in fact, a kind of a proverbial additional effort of 'going an extra mile'. And, legally speaking, this is the main idea of corporate social responsibility. It starts where the legal obligation ends. For some reason, corporations decide to take additional obligations in favour of, for example, their employees, customers and/or the society at large, as in the case of environmental protection measures. Legally speaking these obligations, as a rule, cannot be legally enforced by the beneficiaries and thus fall within the so-called 'soft law'. This said, it is also clear that the formal notion of going beyond legal obligations does not tell us much about the content of this effort.

What does corporate social responsibility cover?

A clear definition always goes a long way in securing a rational debate. In this respect, it is unfortunate that the concept of CSR does not yet have a uniform definition but rather a small sea of them. Zerk for example, in her book *Multinationals and Corporate Social Responsibility* (2006) goes through different definitions put forward by the European Commission, the United Kingdom government, Canadian-based non-governmental organisation Ethics in Action, CSR Wire, The World Economic Forum and The Confederation of British Industries, before she defines CSR as:

[2] On the (sub)option of being »legal but not right« or »lawful but awful«, see, *e.g.*, Passas and Goodwin (2004).

> "the notion that each business enterprise, as a member of society, has a responsibility to operate ethically and in accordance with its legal obligations and to strive to minimise any adverse effects of its operations and activities on the environment, society, and human health" (Zerk, 2006: 32).

CSR is also called 'corporate social performance', 'corporate social responsiveness', 'corporate citizenship' and similar (*cf*. Carroll, 1999). One business dictionary defines it perhaps more adequately broadly as "[a] *company's sense of responsibility towards the community and environment in which it operates*." Or, one can see CSR as a result of a pressure from outside, *i.e*., as a "*requirement placed on an organisation to be accountable for its impact on all stakeholders*" (Okodudu cited in Wosu, 2013: 16). In practice CSR may range from classical philanthropy to a much more encompassing CSR paradigm of "managing for stakeholders": customers, suppliers, employees, financiers and not least communities (Freeman *et al*., 2007). It appears that two motives that may be decisive are either a genuine concern for the issues addressed or self-interest.

In a globalised world where multinational companies (MNC) operate, different states may have different conventional and legal standards. What is considered to be illegal and unacceptable in one country, may be legal or at least tolerated in another. As a result, what is a mandatory legal requirement outside the scope of voluntary CSR in one country may be above and beyond the legal requirements and only considered to be voluntary CSR in another. One can see how this mismatch of standards might contribute to a muddled notion of what voluntary CSR might or should in fact be. A good example is the flaring of associated gas in oil extraction by MNCs, a practice which will be analysed later – alongside others – to illustrate how the CSR may be used to negate and evade the responsibility and appear more socially responsible than one in fact is.

Because of the lack of a clear and broadly accepted definition, the fragmented approach to CSR outlined above is what we have at present. Expectations simply vary, despite the initiatives to create worldwide CSR standards at least in some areas. For example, there is a growing effort to establish coordinated standards for human rights abuses by businesses; the United Nations put forward the 2011 UN Guiding Principles on Business and Human Rights, while the EU proposed its 2016 Council of Europe

Recommendations on human rights and businesses, to name only a few of the most general initiatives.

1. But is it legitimate?

Before jumping ahead, we may ask ourselves whether CSR is, in fact, to be desired and why? Surprisingly the idea is controversial, at least in theory. The Nobel Prize winner for economics Milton Friedman did not like it at all. In his book *Capitalism and Freedom*, he called CSR a "fundamentally subversive doctrine" unsuitable for a free society (Friedman, 1962: 133). In his essay "The Social Responsibility of Business is to Increase its Profits" that appeared in *The New Your Times* magazine in 1970 (Friedman, 1970: 126) he made his point clear:

> ". . . there is only one and only social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."

In a nutshell: the wider social goals are not for business leaders but for the legislature to decide. In the aftermath, one of the ruling figures of the economic analysis of law, Judge Richard Posner, articulated similar concerns in his *Economic Analysis of Law* (1998: 460-463). This understanding of what the corporation is all about is based on the so-called "nexus of contracts" view of the corporation which posits the shareholders' profit maximisation as its sole legitimate goal and sees CSR as a step in the opposite direction (*cf.* Avi-Yonah, 2006: 3-5).

This position on the legitimacy of CSR did raise some academic debate. It became obvious that one's position on CSR depends on one's view of the underlying theory of the purpose of the corporation. Thus, Friedman's negative position on CSR is a logical implication of the view that the sole obligation of the management is to deliver the highest possible profits to the shareholders. Interestingly, however, the interventions of Friedman and his followers did not, in fact, influence the development in corporate CSR practice. Today there is hardly a Fortune 500 corporation that does not issue a kind of a CSR annual report on various issues from environmental protection to traditional charity (*cf.* Spence, 2011: 61).

Hence, CSR is today a widely accepted form of (international) business practice. The idea that started as voluntary internal organisational policy or strategy at the level of individual corporations is witnessing a shift towards wider, more coordinated schemes, standards and soft law recommendations at regional, national and transnational levels (the UN, the EU, *etc*.).

Interestingly, however, the only instance where Milton Friedman would reluctantly tolerate CSR is when it is not used as an "end in itself". In other words, he would tolerate it when it is used as a means to increase profits, even though that does not change the fact that it is still a "hypocritical window dressing", *i.e*. a little bit of a deception, that someone could "disdain as approaching fraud" (Friedman, 1970: 125). As Bakan summarised Friedman's point: "The executive who treats social and environmental values as a means to maximise shareholders' wealth – not as ends in themselves – commits no wrong. It is like 'putting a good-looking girl in front of an automobile to sell an automobile'". This is indeed "hypocritical window dressing" but serves the bottom line (Bakan, 2005: 34). In other words, CSR may only be used as an instrument of increasing the profitability of a business, be it short, mid or long term. In fact, in this respect, it becomes something internal and not external to the business strategy of the corporation as its integral and valuable "profit hub".

Therefore, it looks like the law-abiding corporation faces the following options regarding CSR:

a) not to use CSR at all and proceed with business-as-usual;
b) make CSR part of a business plan and by its effort try to increase profit even more than in case (a); and finally,
c) deliberately employ CSR for intrinsic reasons while taking into account that the profits could (but need not) be lower than without CSR effort.

The division between option b) and c) may not be strict at all. The corporation may believe in intrinsic reasons for CSR and still think this is the best for profit and stability in particular in the long run (a kind of intrinsic 'win-win' situation).

2. Another possible combination

So far, we have assumed that the corporation stays within the limits of (hard) law of the land. But this is not always the case. Even in the case when the corporation decides to break the law it must/may still decide among the same three options concerning the CSR that we outlined above (*i.e*. do nothing, CSR as part of a business plan, or intrinsic CSR).

We are interested in one variation of the second option; a deviant corporation with a CSR mask. This combination may not be so uncommon. For example, the corporation fails to comply with hard and/or self-imposed soft law and at the same time continues to use CSR tools as a deliberate deception or a mask to hide its (primary) deviance. It would be like pretending to go an extra mile without even finishing the required primary distance. A good example would be Enron. We may read in the literature that the notorious Enron Corporation had a special CSR task force with a substantial number of employees. It won many awards for its CSR efforts, including a Climate Protection Award, and a 'Corporate Conscience Award'. Despite the image of a high 'corporate conscience' and a good 'corporate citizenship' that they carefully produced and maintained, its main business activities turned out to have disastrous and criminal consequences on many levels, including environmental protection. One of the main protagonists, Enron's president Jeff Skilling, could not have described it better when he clarified to one of his energy department executives: "*Mike . . . we are a green energy company, but the green stands for money*" (*cit.* in Bradley, 2009: 309-310, *cf.* Bakan, 2005: 57-58).

Consequently, we can expand our classification even further. There are two types of using CSR as a 'hypocritical window dressing', *i.e*. as a mask: (1) by a law-*abiding* corporation to appear compassionate and concerned (in order to increase profits) and (2) by a law-*breaking* corporation to appear compassionate and concerned (in order to increase profits or deflect law enforcement attention). In both cases, we assume profit maximisation

as the final goal.[3] The second type employs CSR mostly as a kind of a PR, cover up or a pre-emptive damage control activity.

This brings us to the analogy that we want to explore further. Using CSR as a deception in order to hide unethical, illegal or even criminal activities may signal certain corporate "character traits". Joel Bakan pointed this out in his renowned work *The Corporation* (2005). He asked himself whether a parallel between deviant modern multinational corporations and human psychopaths is possible. It appeared to him that:

> "Human psychopaths are notorious for their ability to use charm as a mask to hide their dangerously self-obsessed personalities. For corporations, social responsibility may play the same role. Through it, they can present themselves as compassionate and concerned about others when, in fact, they lack the ability to care about anyone or anything but themselves" (Bakan, 2005: 57).

He decided to present this question to one of the highest authorities on the issue of human psychopathy – Robert D. Hare – a researcher renowned in the field of criminal psychology, who in the 1970s developed a diagnostic tool called the psychopathy checklist (PCL). He asked him to apply the test to corporations in general. Hare observed numerous similarities, summarized by Bakan as follows: "The corporation is *irresponsible*, Dr. Hare said, because *"in an attempt to satisfy the corporate goal, everybody else is put at risk."* Corporations try to *"manipulate everything, including public opinion"*, and they are *grandiose*, always insisting *that we're number one, we're the best."* A *lack of empathy* and *asocial tendencies* are also key characteristics of the corporation, says Hare – *"their behaviour indicates they don't really concern themselves with their victims"*; and corporations often "*refuse to accept responsibility for their own actions* and are *unable to feel remorse*: *if* [corporations] *get caught* [breaking the law], *they pay big fines and they . . . continue doing what they did before anyway*." And in fact, in many cases, the fines and the penalties paid by

[3] The financial profitability of CSR for the corporation has been assessed empirically. Conclusions are not unanimous; early studies reported positive, negative and neutral financial impact. A meta-study published in 2003 concluded that CSR actually pays off (Orlitzky, Schmidt, Rynes, 2003).

the organisation are trivial compared to the profits that they rake in. Finally, according to Dr. Hare, corporations relate to others *superficially* – "*their whole goal is to present themselves to the public in a way that is appealing to the public [but] in fact may not be representative of what th[e] organisation is really like*" (Bakan, 2005: 57). After going through the entire PCL checklist in this manner, the conclusion he was able to make was the following:

> ". . . it would be pretty hard for us not to look at the corporate structure itself as not being psychopathic. They would have all the characteristics. And in fact, I suppose one could argue that in many respects a corporation of that sort is of the prototypical psychopath, at the corporate level instead of the individual level" (Bakan, 2005: 56-57).[4]

In other words, Hare agreed with Bakan that the analogy could be meaningful. Superficial, grandiose, manipulative, irresponsible, impulsive, striving for short-term goals, asocial, without empathy or remorse and without the ability to accept responsibility – these are the traits that a modern corporation and a psychopath have in common. The only symptom on his PCL that Hare was not able to identify was poor behavioural control, which in fact is still greater cause for concern, as it may indicate clear rational intent.

Some examples of CSR (mis)use by multinational oil companies

Undoubtedly, some of the accidents in the oil industry are results of the nature and intrinsic danger of this activity.[5] On the other hand, oil and gas

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[4] Dr. Hare was also included in the documentary based on and named the same as Bakan's book, *The Corporation*.

[5] The Exxon Valdez oil accident, in the aftermath of which 11 million gallons of crude oil spilled and polluted 1.932 kilometer of Alaska's Prince William Sound coastline in 1989, did involve reckless action, but as the US Supreme Court found in *Exxon Shipping et al. v. Grant Baker et al.* "it was without intentional or malicious conduct, and without behaviour driven primarily by desire for gain" (para.40). In this case, the US Supreme Court recognised that not all accidents can be treated equally and capped punitive damages in cases

MNCs are repeatedly mentioned in connection to intentional labour and human rights law violations, not to mention the environmental pollution. They typically function in a trans-border, multi-jurisdictional business environment, many times involving developing countries with an ineffective legal system in place. But, even if their legal obligations are muddled or not enforced effectively, they still have CSR tools at their disposal.

On a generic level, codes of conduct, principles, guidelines/standards (including management and reporting systems), benchmarks, networks and multi-partner organisations, awards, to name but a few, are all considered to be voluntary CSR tools. Multinational oil companies have at their disposal all of the CSR tools intended for general use (such as for example the United Nations Global Compact, Global Reporting Initiative (GRI), Voluntary Principles on Security and Human Rights, AA1000 Assurance Standard, etc.)[6] as well as those put in place specifically for extractive industries (such as for example Extractive Industries Transparency Initiative (EITI), Publish What You Pay (PWYP) and Global Gas Flaring Reduction (GGFR).[7]

These tools can also be used as a mask, but to get the better picture one should look at it in greater detail. At the same time we may also try to identify some of the 'psychopathic' traits mentioned by Hare. Some MNC were accused of complicity in grave human rights violations, such as forced labour, rape, and murder in the case of the Unocal gas pipeline construction in Myanmar[8] or alleged killings in Nigeria in the *Wiwa v. Royal Dutch Petroleum Co.*[9] and *Bowoto v. Chevron*[10] cases. In addition, multi-

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of reckless action profitless for the tortfeasor to 1:1 in relation to compensatory damages, consequently reducing punitive damages from $ 2.5 billion to $ 500 million.

6 *See* http://www.unglobalcompact.org/, http://www.globalreporting.org/Home, http://www.voluntaryprinciples.org/, http://www.accountability21.net/

7 *See* http://www.publishwhatyoupay.org/, http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTOGMC/EXTGGFR/

8 The *Doe v. Unocal* case was brought before a U.S. court and settled before it ended. *See* Girion (2004) and also Rosencranz and Louk (2005).

9 Wiwa v. Royal Dutch Petroleum, 226 F.3d 88 (2nd Cir. 2000)

10 Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2nd 1229 (N.D. Cal. 2004)

national oil corporations have dubious records in upholding their environmental pledges, despite their going green and promising responsibility towards the environment. Because of this, NGOs frequently accuse corporations of greenwashing, that is of "*unjustified appropriation of environmental virtue by a company . . . to create a pro-environmental image, sell a product or a policy, or to try and rehabilitate their standing with the public and decision makers after being embroiled in controversy*" (Source Watch 2010: 55). Similarly the term 'blue wash' is used to characterise the abuse of goodwill towards the United Nations by those participants of the Global Compact that wrap themselves in the flag of the UN, while still violating human rights, labour and environmental standards. Many times there is a lack of any monitoring or enforcement of standards by the UN itself (Kenny and Karliner, 2000: 39). Not surprisingly, multinational oil corporations figure highly in such indictments (*e.g.* Solman, 2008; Moreci, 2008; Cheeseman, 2008).

A particular example is gas flaring in the Niger Delta, which we want to look at in greater detail. It occurs when natural gas is released as a consequence of oil production. Since it is unprofitable to collect, it is burnt on the site. The near-constant combustion this entails has severely detrimental effects on the local environment and people. (*cf.* Earth Report/BBC, 2010: 18). In the Niger Delta, in particular, gas flaring has been going on for decades with disastrous consequences for the environment and the inhabitants of the area.[11]

If one looks at the codes of conduct of Royal Dutch Shell, Chevron and Exxon/Mobil, which are among the biggest players in Nigerian oil production, all are highly committed to protecting the environment[12], yet have still to curtail or are very slow in curtailing the harmful gas flaring in the Niger

[11] *Cf.* Wosu (2013) for the comprehensive overview of the various forms of harmful externalities of oil exploration in the Niger Delta. For a very recent overview of the situation see, e.g., Jerič (2018).

[12] For example Royal Dutch Shell in its code of conduct states that it is "committed to the goal of doing no harm to people and protecting the environment" while "contributing to the communities in which we operate as good neighbours, creating lasting social benefits." (Royal Dutch Shell, Code of conduct). Chevron states: "We place the highest priority on the health and safety of our workforce and protection of our assets, communities and the environment" (Chevron, The Chevron way). Exxon Mobil conducts its business". . . in a manner that is responsive of the environment and economic needs of the communities in which we operate". (ExxonMobil, Environmental performance).

Delta oil production. The first legislative acts aimed at reducing gas flaring go back as far as 1973, yet without much success. Way back in 1999 the Nigerian government and the oil industry operators had agreed to end flaring by 2008 but no substantive improvement has been achieved so far (*cf.* Ukwuoma, 2008). This reluctance or extreme tardiness in tackling gas flaring is symptomatic for the entire oil community in Nigeria. Thus the conclusion: "*the history of commitment on this issue is that of broken promises, ground-shifting, shady deals and ignored legislation*." (*ibid.*)

It is not difficult to see how this description of the oil companies' conduct in Nigeria accords with Hare's diagnosis of psychopathic behaviour. It would, of course, be biased not to take into account the technical and practical difficulties involved in diverting associated gas to other uses, which is the usual explanation given by the oil corporations. Yet, as the Director of the Department of Petroleum Resources (DPR), Chukwueke, pointed out:

> "The federal government and the oil companies agreed on the zero gas flaring date. In fact, it was the oil companies that chose the date. So, they do not have any reason for not meeting with the deadline [. . .] The zero gas flaring was supposed to be January 1, 2008, but some of them in the industry were arguing that it should be December 31, next year, now they are also saying we should give them till 2010 [. . .] the industry knew the context when it agreed on the 2008 date" (*ibid.*).

Even today, more than ten years after the agreed upon but many times extended "deadline", the situation has not improved substantially. It is therefore not so much a case of technical difficulties as one of short-term cost/benefit calculation for the multinational oil corporations concerned.[13] There is a price tag on multinational oil corporations' environmental concern.

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[13] This is supported by the following: "According to *The Guardian* source, the oil companies submitted that putting a deadline on gas flare *without adequate funding arrangements* for oil and gas projects would not help the course of the government in addressing environmental and economic factors associated with gas flaring in the country" (Ukwuoma, 2008). In 2009 the Nigerian senate set a new date to end gas flaring – December 2010. With the expiry of this deadline, the flaring of gas was supposed to become a criminal offence in Nigeria; except, typically, for those who get a special permit of exception from the minister concerned (for start-ups, equipment failure, and other considerations).

The main obstacles to accountability

Multinational oil corporations adhere to double or often multiple standards. They have to follow one set of rules, usually highly regulated and enforced in their home state (or a developed host-state), while they follow "international best practices for oil production" in developing host states (Global Gas Flaring Reduction). The latter are just "best practices" and any enforcement in developing and usually corrupt host state is notoriously difficult to achieve, as the case of Niger Delta gas flaring illustrates.

Separate legal personalities of MNC's subsidiaries (or contracting partners) in each state where the multinational corporation operates create jurisdictional problems which arise as a result of that separation. This presents obstacles in establishing any kind of accountability on the side of the multinational oil corporation as a whole (Zerk, 2006: 104 *et seq.*). If there is a major incident, one grave enough to be reported internationally, the consequences for the corporation concerned usually go no further than some bad publicity, a temporary reduction in its stock prices or, at worst, the liquidation of a subsidiary. Nonetheless, human rights standards[14] and the emerging international standards of conduct regarding the environment[15] and labour[16] may be creating a level of tolerance which, if broken, can result in civil and criminal[17] liability in the corporation's home state,

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[14] *See* the Universal Declaration of Human Rights (G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); 6 ILM 360 (1967); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); 6 ILM 368 (1967).

[15] *See* the Rio Declaration on Environment and Development (31 ILM 874), which lists 27 (environmental) principles including the precautionary principle, the "polluter pays" principle, environmental impact assessment and the concept of sustainable development.

[16] *See* the ILO Declaration on Fundamental Principles and Rights at Work, 37 ILM 1233 (1998).

[17] The nationality principle, for example, permits a country to exercise criminal jurisdiction over any of its nationals accused of criminal offences in another state. In Slovenia, for example, there are special substantive criminal law provisions pertaining specifically to juridical persons, meaning that a corporation based in Slovenia can be put on trial as a corporation/juridical person and a

despite possible laxity in its host country's legislation or powers of enforcement.

Emerging solutions /remedies?

As to 'hard law' violations – the only ones that can be legally enforced – Zerk suggests that

> "it is possible that, given time, more general or procedural obligations for multinationals could emerge, such as a prohibition on double standards, an obligation to carry out environmental impact assessments and apply a precautionary approach, and an obligation to warn affected employees, communities and consumers of health, safety, and environmental risks" (Zerk, 2006: 298).

In her book, she examines two possible solutions for regulating multinational corporations, specifically home state regulation and international regulation and generally appears to favour (future) international regulation (Zerk, 2006: 299-310). However, given the reluctance of states to surrender their sovereignty and the time it will take to establish and implement the international bodies and adopt mandatory regulation[18], home state regulation would seem to be the only choice for the time being.

conviction can ultimately result in its liquidation. *See Zakon o odgovornosti pravnih oseb za kazniva dejanja*, Ur. l. RS 98/2004, 65/2008 (SLO).

[18] A practical example is well presented by Stephen Kabel (2004: 477-478). He describes an unsuccessful process of negotiation to bring legal persons within the jurisdiction of the International Criminal Court (ICC). The French proposal was ultimately withdrawn. The author argues, though, that the jurisdiction over legal persons, although not express, is implicitly recognised. *See* also Šugman and Jager (2009) for an EU case study on sovereignty in criminal matters (specifically regarding environmental protection).

1. Tort law

In addition, home state regulation already exists. Zerk identifies four groups of theories on parent company liability which can be utilised to establish accountability in a parent company or subsidiary, once the case is accepted by a home state court (Zerk, 2006: 215-233). The amount or lack of control exercised by the parent company seems to be the deciding factor and it is here that voluntary CSR tools can play a role. Especially initiatives to increase transparency (such as GRI) or set operational standards (such as ISO 26000 or AA 1000 AS) can make it easier to prove effective control in a court of law by leaving behind a clear paper trail and also detailing misconduct such as misrepresentation or lack of due care. Therefore, even though CSR initiatives are voluntary by nature, they can aid in establishing/proving accountability once they are in place.

2. Criminal law

As for criminal liability and home state prosecution, one needs to distinguish two categories, namely, the prosecution of individuals working for multinational companies and the prosecution of the parent company as a juridical person. The former lies outside the scope of the present chapter, while the criminal responsibility of legal persons has gradually been established in common law as well as on the continent. Selinšek notes that while in most continental European states[19] the criminal responsibility of juridical persons is seen as an accessory to that of the physical person who is acting in its name, the evolution, especially of the US law, appears to be moving towards accepting the independent and principal responsibility of corporations (Selinšek, 2005: 192).

Slovenia, for example, has adopted a Criminal Liability of Legal Entities Act[20], which in article 3/3 states that a domestic legal entity is responsible also for a felony committed abroad against a foreign state, citizen or legal entity. According to the act, there are five possible sanctions for a legal entity found guilty of such a felony, namely:

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[19] An exception she makes note of is Belgium, where the conviction of a corporation generally excludes criminal responsibility on the part of the agent acting for it unless the agent acts intentionally. *See* also Faure (1999: 111).

[20] Zakon o odgovornosti pravnih oseb za kazniva dejanja (Criminal Liability of Legal Entities Act), Ur. l. RS 98/2004, 65/2008 (SLO).

1. a monetary fine;
2. confiscation of property;
3. liquidation (with confiscation of property);
4. ineligibility for participating in public tenders and
5. a prohibition from trading with financial instruments (art. 12).

In addition, a conviction may also result in the revocation of issued concessions/licenses and inadmissibility from entering new bids for licenses/concessions (art. 21). In the US, a corporation may, for example, be found guilty of knowing endangerment and fined under the Federal Water pollution Control Act (sec. 309).[21] The US also has the so-called charter revocation laws and, notably, the notorious multinational oil company Unocal was among the first in the modern age to be threatened with a corporate death sentence (Mokhiber, 1998).

The global nature of multinational corporations adds yet another layer of complexity to the debate. As with tort law, there are legal obstacles preventing one from treating a multinational corporation/enterprise as a single (accountable) entity. When several separate legal entities in a 'home' state are involved, the concept of aiding and abetting can sometimes be of help (Selinšek, 2005: 209-225). However, given the accessory nature[22] of this concept, it often fails when different jurisdictions and substantive standards are involved. If there is no underlying violation by a principal in a foreign state due to a different substantive criminal provision there, aiding and abetting should theoretically be excluded from further consideration. There is a simple solution to the problem, nevertheless. As with the classic textbook example of a separate criminal offence of aiding and abetting in connection to suicide, the legislative body of the home state can always transform aiding and abetting into an independent felony; it can criminalise aiding and abetting in connection to a specific crime.

As in the case of tort law, we may come to the same conclusion concerning the importance of CSR tools in relation to criminal law responsibility; CSR tools once in place can aid in establishing/proving accountability.

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[21] Federal Water Pollution Control Act, 33 USC 1251 *et seq.* (US).

[22] By "accessory nature" one should understand the requirement of double criminality, because if the act of the principal (in a host-developing state) is not a criminal act, then according to accepted theory, aiding and abetting should not be criminalised either.

Conclusion

Milton Friedman argued that the only legitimate social responsibility of business is to increase its profits no matter what, "*so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud*" (Friedman, 1970: 126). Even if we – for a moment – remain in this frame of mind, we see that he must have assumed a developed, relatively non-corrupt and effective legal system that in principle punishes businesses practicing 'deception or fraud'. Yet, in many if not most of the developing countries of the world, this is, unfortunately for the majority of their citizens, not the case. The government does not do its job properly, and some of these countries are wholly or partly 'failed states".

On top of that some of them may suffer the so-called 'oil curse' (*cf.* Collier, 2008), the idea that sometimes petroleum wealth creates more harm than good for the oil-rich country. In a highly globalised business of oil extraction multinational oil corporations operate in such Third World, corrupt, legally underdeveloped and partly or totally failed states. In comparison to their home – mostly First World – country, the business environment of a host country may be more muddled and less concerned about the standards of applicable laws and regulations, to say the least. In such a situation, Friedman's "*profits at all costs seeking*" MNC will delay the implementation of costly environmental improvements as the risk of being "*effectively, proportionately and dissuasively*" sanctioned will be very small. Meanwhile, it will try to maintain the green image in order to reduce the eventual reputational damage. The case of gas flaring in the Niger Delta illustrates how corporations, using CSR as PR, want to appear more socially responsible than they actually are.

To conclude – widespread CSR efforts of corporations acknowledge the fact that they do not operate in a social void. There are instances of genuine ethically driven CSR and CSR initiatives that begin to take into account all those that have a stake in activities of a business. But clearly, CSR is also much too often misused as a mask, analogous to the way a human psychopath uses his charm as a fake façade hiding his self-absorbed personality.

Nonetheless, to answer our question in the title of this essay, even in these cases, once the CSR tools with their procedures and standards are in place, they may leave behind paper trails, which can make it easier to prove

illegal misconduct in the court of law either in a tort, administrative or criminal case.

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